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IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-1672

T. W. GUTHRIE, et al.,
Petitioners,

versus

ALABAMA BY-PRODUCTS COMPANY, et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals
For the Fifth Circuit

BRIEF

In Opposition on Behalf of Respondents, Bessemer Galvanizing Works, E. I. du Pont de Nemours and Company, Hercules Incorporated, Republic Steel Corporation, United States Steel Corporation

QUESTION PRESENTED

Whether a private civil action for damages to property, allegedly resulting from water pollution, against persons discharging refuse into navigable waters in violation of 33 U.S.C. §407 constitutes a controversy arising under the laws of the United States.

STATEMENT OF THE CASE

These Respondents deem it necessary to correct certain inaccuracies and omissions contained in the Petitioners' Statement of the Case.

The Petitioners aver injury or damage to their property rights as a result of alleged water pollution by all of the Respondents. All of the Petitioners are citizens of the State of Alabama. Some of the Respondents are citizens of the State of Alabama, but most are citizens of states other than Alabama.

The Petitioners based federal jurisdiction of their action upon 28 U.S.C. §1331(a), which provides for jurisdiction when the controversy "arises under the Constitution, laws or treaties of the United States," and specifically stated that the "laws" of the United States under which this controversy arose was 33 U.S.C. §407 (Section 13 of the Rivers and Harbors Act of 1899). The United States District Court for the Northern District of Alabama granted the Respondents' motions to dismiss the action on the ground that there was a lack of federal question jurisdiction because the controversy did not arise under the laws of the United States within the meaning of 28 U.S.C. §1331(a). In a per curiam opinion, the United States Court of Appeals for the Fifth Circuit affirmed the decision of the District Court.

ARGUMENT

This case involves nothing more than a traditional local cause of action by private individuals for damages to real property resulting from water pollution. Jurisdiction below was not urged on the basis of diversity of citizenship, but rather that the Petitioners' claim was one arising under the laws of the United States in that the claimed water pollution was also in violation of 33 U.S.C. § 407. The United States District Court held that it did not have jurisdiction over Petitioners' claim in that the claim was not so substantially or directly related to a violation of 33 U.S.C. §407 as to confer federal jurisdiction under 28 U.S.C. § 1331(a) as a controversy arising under the laws of the United States. An analysis of this case and the facts and law surrounding it, fails to reveal any good reason or valid basis for granting the petition for writ of certiorari.

I. There Is No Conflict of Decisions.

The decision of the Court of Appeals in this case is not in conflict with any decisions of the Supreme Court of the United States nor of any decisions of any Court of Appeals of other Circuits.

A. There is no conflict with decisions of the Supreme Court:

The decisions of this Court have established certain standards or tests for determining whether or not a case arises under the laws of the United States for the purposes of federal question jurisdiction. The decision in this case is clearly consistent with those decisions. In **Gully v. First National Bank in Meridian**, 299 U. S. 109 (1936), it was stated that the right or immunity created by the law of the United States "must be an element, and an essential one, of the plaintiff's cause of action". That case points

out that not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. Such is obviously true in the case at bar. This can be emphasized by paraphrasing a portion of the opinion in the **Gully** case, supra, at page 115:

> If there were no federal law prohibiting the discharge of refuse into navigable waters, a suit to recover damages for such would not be one arising under the laws of the United States. That there is a federal law prohibiting such discharge does not change the basis of the suit, though the federal law may be a measure of the standard of conduct.

The laws of the State of Alabama have long recognized claims such as presented by the Petitioners here. **Tutwiler CC & I Co. v. Nichols**, 146 Ala. 364, 39 So. 76 (1905); **Montgomery Limestone Co. v. Bearden**, 256 Ala. 269, 54 So.2d 571 (1951). The allegation that respondents are violating 33 U. S. C. § 407 adds nothing to Petitioners' basic claim. The claim of Petitioners does not directly and substantially involve a dispute or controversy respecting the validity, construction or effect of the Act upon the determination of which the result depends. **Shulthis v. McDougal**, 225 U.S. 561 (1912).

The other decisions of this Court, cited by Petitioners as being in conflict with the decision of the Court of Appeals for the Fifth Circuit, are plainly not applicable to the present situation, either in fact or principle. **Steele v. Louisville & N. R. Co.**, 323 U.S. 192 (1944), and **Tunstall v. Brotherhood of Locomotive Firemen & Enginemen**, 323 U.S. 210 (1944), were claims concerning racial discrimination by a labor union operating under the Railway Labor Act which directly and substantially involved the interpretation and effect to be given that Act, as well as the constitutional prohibitions against racial discrimination. Indeed, **Steele v. Louisville & N. R. Co.**, supra, did not involve federal question jurisdiction.

Petitioners also assert that the decision of the lower court is in conflict with the decisions by this Court in **Texas & Pacific Ry. Co. v. Rigsby**, 241 U.S. 33 (1915), and **Bell v. Hood**, 327 U.S. 678 (1946). While **Texas & Pacific Ry. Co. v. Rigsby**, supra, holds that a railroad employee has a right of action under the Federal Employers Liability Act for injuries resulting from a violation thereof, the situation presented by **Crane v. Cedar Rapids & I.C.R. Co.**, 395 U.S. 164 (1969), is more analogous to the Petitioners' situation. The **Crane** case, supra, holds that there is not an implied federal private right of action in favor of every person (there a non-railroad employee) as the result of a violation of a federal act (there the Safety Appliance Act).

In **Bell v. Hood**, 327 U.S. 678 (1946), the plaintiff's constitutional rights under the Fourth and Fifth Amendments had been violated by the defendants. Respondents have no quarrel with the general principle stated therein that federal question jurisdiction is present when the claim is founded substantially or directly upon a federal law or the Constitution; however, that case is otherwise inapplicable to the instant case.

These Respondents know of no decision of this Court which holds that private parties such as these Petitioners, alleging a traditional local cause of action for damages to property are entitled to invoke federal question jurisdiction. This case is not a "standing" case brought under the Administrative Procedure Act, 80 Stat. 392, 5 U.S.C. § 702, as was **Sierra Club v. Morton**, ... U.S. ..., 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972); nor is it a proceeding brought by the United States, the party charged with enforcement of the Act and the principal beneficiary thereunder, to protect its interests in preventing obstructions to the nation's waterways as in **Wyandotte Transportation Co. v. United States**, 389 U.S. 191 (1967). The

provisions of 33 U.S.C. § 407 set forth the prohibitions against deposit of refuse in navigable waters without a permit from the Corps of Engineers. Specific and limited penalties for violations of Section 407 are provided for in 33 U.S.C. § 411. The affirmative duty of enforcing Section 407 is specifically placed on the Department of Justice by 33 U.S.C. § 413.

J. I. Case Company v. Borak, 377 U. S. 426 (1964), cited by Petitioners is inapposite to this case. There the statute specifically granted to "the appropriate District Courts jurisdiction over 'all suits in equity and actions at law brought to enforce any liability or duty created' under the Act." 377 U.S. 430-431. There is no similar provision in 33 U.S.C. Sections 407, 411 or 413, or other related sections, from which a private right of action may be implied.

The Petitioners have failed to demonstrate any basis for their assertion that they are within the special class of persons sought to be protected by 33 U.S.C. § 407 so as to entitle them to have a private right of action implied in their favor. Petitioners' assertion to this effect is wholly unsupported by the facts of the case and the decisions of this Court.

Petitioners also contend that this decision is in conflict with the decision of this Court in **United States v. Standard Oil Co.**, 384 U.S. 224 (1966), in that the Fifth Circuit interpolates an "impediment to navigation" test into the provisions of 33 U.S.C. §407. There are two fallacies with Petitioners' argument. The basic fallacy is that **United States v. Standard Oil Co.**, supra, did not concern itself with this peripheral matter. The only question presented for review to this Court in that case was whether or not commercially valuable aviation gasoline was within the meaning of "any refuse matter". Also, that case did not involve litigation between private

parties, but was a criminal proceeding instituted by the Government. The decision in the instant case held that there was a lack of federal question jurisdiction, in a suit by private riparian landowners for the traditional tort actions of water pollution.

There can be no doubt that the decision below is in accord with the decisions of this Court. **Gully v. First National Bank In Meridian**, 299 U.S. 109 (1936); **Shultis v. McDougal**, 225 U.S. 561 (1912). The decision below is neither in conflict with any decision of this Court nor with any principles or reasoning contained in such decisions.

B. There is no conflict with decisions of other Courts of Appeals:

There is no decision in any other circuit which holds that a suit by private citizens alleging injury to their property, resulting from a violation of 33 U.S.C. § 407, provides a basis for federal jurisdiction as an action arising under the laws of the United States. The only decision involving an attempt by private parties, similar to Petitioners, to bring a civil action positing federal jurisdiction on a violation of 33 U.S.C. § 407, is **Lavagnino v. Porto-Mix Concrete, Inc.**, 330 F.Supp. 323 (D.Col., 1971). The Colorado District Court reached the same result as the District Court for the Northern District of Alabama and the Fifth Circuit in this case.

Petitioners urge as a reason for granting a writ of certiorari that the decision of the Fifth Circuit is in conflict with the decisions of the 2d Circuit in **United States v. Ballard Oil Co.**, 195 F. 2d 369 (1952); the 3rd Circuit in **United States v. Esso Standard Oil**, 375 F. 2d 621 (1967), and the 9th Circuit in **La Merced**, 84 F. 2d 444 (1936). The cases cited by Petitioners are all criminal prosecutions by the United States Government to enforce the provisions

of 33 U.S.C. § 407, et seq. Additionally, they did not involve any issue remotely akin to the case at bar. In **United States v. Ballard**, supra, the Court stated the issue involved in that appeal as follows:

> "The only question involved in this appeal is whether the escape of oil from the defendant's tank, . . . constituted a violation of § 407 of Title 33 USCA." Pg. 370

The issue on appeal in **United States v. Esso Standard Oil**, supra, was whether or not the provisions of the Rivers and Harbors Act were broad enough to cover "indirect deposits of refuse into navigable waters".

La Merced, supra, was a libel of information brought by the United States Government against the oil screw La Merced for the penalties provided by the Rivers and Harbors Act for oil pollution of Lake Union at Seattle, Washington. There the Court stated:

> "The sole issue is whether the phrase 'any refuse matter of any kind or description whatever' includes 'oil' within its meaning." Pg. 445

The decisions of the Courts of Appeals of other circuits cited by Petitioners are patently distinguishable from the decision below of the Fifth Circuit as involving not only Government enforcement of 33 U.S.C. § 407, but also different questions of law. The decision of the Fifth Circuit is not in conflict with decisions of any other federal circuit.

II. There Is No Important Question of Federal Law.

Although the public and the federal and state governments have shown a growing concern over water pollution and other environmental conditions, no amount of strained reasoning can convert the very narrow issue in this case into one involving an important question of federal law. By Petitioners' own admission, the Department of Justice of the United States has been, and still is, engrossed in a concerted drive, by way of criminal prosecutions to clean up the nation's waterways. The petition for a writ of certiorari and the accompanying argument are replete with citations of cases brought by the Government as the enforcer of the provisions of 33 U.S.C. § 407. The decision of the Fifth Circuit is limited in its application and presents no impediment to nor places any restrictions on the Government's role as enforcer of 33 U.S.C. § 407.

The substantive rights of private litigants have not been affected by the Fifth Circuit's decision. The decision does not deprive Petitioners, or others similarly situated, of a complete and adequate remedy. Unquestionably, their claim may be presented in the appropriate state court. Indeed, federal jurisdiction could have been invoked in this case on the grounds of diversity of citizenship by naming as defendants only those industries with citizenship diverse from Petitioners. The public concern over environmental quality, in and of itself, does not justify review of the per curiam opinion of the Fifth Circuit that no federal question jurisdiction exists over traditional private tort claims under state law, any more than public concern over the rising costs of automobile insurance, in and of itself, elevates an automobile accident case to one worthy of consideration by this Court. Broad generalizations and remotely possible analogies unrelated to the present factual situation do not and should not persuade this Court that this case presents a question of federal law of such vital importance as to warrant review.

III. The Decision Below Is Clearly Correct.

Although it may not be the province of this brief to defend the correctness of the decision in this case, these Respondents feel compelled to make clear that the decision was correct. As pointed out under Division I of the Argument, when applying the tests and standards of federal question jurisdiction as established by this Court in **Gully v. First National Bank in Meridian**, 299 U.S. 109 (1936), and **Shultis v. McDougal**, 225 U.S. 561 (1912), it is abundantly clear that the present claim by Petitioners fails to meet the requisite test for federal question jurisdiction. Petitioners' claim is nothing more and nothing less than a traditional local cause of action which does not substantially and directly involve a federal statute. To hold otherwise would be to open the doors of the federal courts to all manner and kind of litigation where a question of federal law is merely "lurking in the background." **Johnston v. Byrd**, 354 F. 2d 982 (5th Cir., 1965).

The opinion of the District Court was rendered only after submission of briefs and oral argument by the parties and after careful and deliberate consideration of the issues by the Court. The Court of Appeals for the Fifth Circuit found the decision of the District Court to be correct and apparently felt that the opinion was so well reasoned that it was not necessary for the Fifth Circuit to write an opinion of its own. The cases cited in the opinion of the District Court clearly support its decision. Other than by reference to the opinion of the District Court, we see no reason to burden this Court with the further citation of those authorities. Under the circumstances of the present case, the decision of the District Court was manifestly correct. In fact, the Court could have reached no other result. There being no conflict of decisions, nor any important question of federal law, there is nothing requiring review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted

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